CHUA SU YIN & CO.

v.

NG SUNG YEE & LEE LEE

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[CIVIL APPEAL NO. 11-37 OF 1988]
3 APRIL 1990

LEGAL PROFESSION: *Solicitor holding purchasers' money as stakeholder - Client is vendor/housing developer - Garnishee proceedings - Disclosure of privileged communication - Course of employment - Client/solicitor relationship - Evidence Act 1950, s. 126.*

The respondent obtained judgment against Y, a developer, for late delivery of houses. As required under the Housing Developers (Control and Licensing) Regulations 1982, (the regulations) Y had retained the appellant C as a solicitor, to retain 5% of the purchase price paid by the purchasers as a stake-holder. The respondent was seeking to garnish this retention money. C contended that under s. 126 of the Evidence Act 1950 (the Act), she could not disclose whether or not there was any money belonging to Y as this would result in disclosure of client/solicitor communication. This objection was overruled by the Magistrate; hence this appeal.

The only issue for the Court was whether a client's money held in trust by a solicitor in his client's account can be an appropriate subject of garnishee proceedings in view of the provision of s. 126 of the Act.

Held:

[1] Before s. 126 of the Evidence Act 1950 can apply there must be a prerequisite of client and solicitor relationship.

[2] (a) At the material time, C was acting for the vendor, who was also the housing developer;

(b) the person who made the payment were the purchasers who were not the agents or clients of the solicitor who had been engaged by the developer under the regulations;

(c) on the facts of this case, there is an absence of communication or any relationship between the solicitor garnishee and purchasers; here the communication is from a person who is not really a client, this is not a class of communication which the law was designed to protect.

[3] It is a communication which the purchaser would want to be made public and on the face of it should and ought to be published as suppressing it would result in no proof that the purchasers had paid and how much.

[4] Although such disclosure would be detrimental to the client, C has to disclose such communication for the benefit of the purchasers who made these payments which must now be accounted for.

[C's appeal dismissed.]

Legislation referred to:
Evidence Act 1950, s. 126

For the Appellant - Lee Buck Heng; M/s. Abdullah A. Rahman & Co.
For the Respondents in CA 37-41 of 1988 - David Ng; M/s. Lim & Hooi
For the Respondents in CA 48-50 of 1988 - C.S. Tam; M/s. C.K. Tam & Co.

[**Editors** note: The following cases were heard together at this High Court sitting:
List of Cases:
Chua Su Yin & Co. v. Tai Chin Long & Anor. (CA No. 11-38 of 1988)
Chua Su Yin & Co. v. Yee Ka Chong & Anor. (CA No. 11-39 of 1988)
Chua Sa Yin & Co. v. Lai Yin Kheng (CA No. 11-40 of 1988)
Chua Sa Yin & Co. v. Gi Aai @ Yee Yoke Moi (CA No. 11-41 of 1988)
Chua Sa Yin & Co. v. Koh Sin Choy & Anor. (CA No. 11-48 of 1988)
Chua Sa Yin & Co. v. Chin Ah Bah (CA No. 11-49 of 1988)
Chua Sa Yin & Co. v. Lun Mon Tick (CA No. 11-50 of 1988)]

JUDGMENT

Abu Mansor Ali J:

In these appeals Mr. Lee Buck Heng appears for appellant in CA 37 of 1988 to CA 41 of 1988 and Mr. David Ng appears for the respondents. In CA 48 of 1988 to CA 50 of 1988 Mr. Tam is for the respondents. At the outset of arguments Mr. Lee informed the Court that the many appeals raise only one issue and he said that parties have agreed that the Court only deal with CA 48 of 1988 and the decision in CA 48 of 1988 will bind all parties. This was confirmed by Mr. Ng and Mr. Tam for respondents in the respective civil suits.

The only question coming for decision of this Court is whether a client's money held in trust by a solicitor in his client's account can be an appropriate subject of garnishee proceedings in view of the provision of s. 126 of the Evidence Act 1950.

The facts that led to the dispute are these. Yondazgreen the developer was sued by the respondent for late delivery of the houses built. The Court entered judgment against the company Yondazgreen for the sum of RM14,343.34 on 11 April 1988 in the case 82-72 of 1987 with interest at 8% p.a. from 2 July 1987 till realization and costs at RM350. The appellant was solicitor for this company. The sum subject matter of judgment is the sum sought to be garnished by the respondent in this appeal.

Under the Housing Developers (Control and Licensing) Regulations 1982 it is incumbent for a housing developer to retain a solicitor to act to receive the final payment of 5% of the purchase price from the purchaser as a stakeholder. The sum so retained is for making good any defect within the defect liability period of 12 months. The first 2½% to be released after 6 months and the next 2½% after 12 months in the event there is no claim.

It is common ground that what the respondent was seeking to garnish was this retention money, if any, held. In the Magistrate's Court below a garnishee order to show cause was taken out and served on the appellant asking the appellant to show cause why if any money is with the respondent that money should not be garnished. At the hearing below the appellant raised a preliminary objection contending that she was not in a position to say whether in fact there was or there was no money belonging to the judgment debtor (the company) held by her in view of s. 126 of the Evidence Act 1950. The objection was overruled. These appeals are against the decision of the learned Magistrate.

Mr. Lee then addressed the Court on the provisions of s. 126 of the Evidence Act. Mr. Tam correctly pointed out to Court that what the Court had to decide and what the parties had agreed to submit for a decision was not a question of law of principles of privileged

communication. What the Court had to answer specifically and more subjectively was as to the true position of the money held by a solicitor as a stakeholder and in the present case all the garnishee need to answer is: is there or is there no money due or payable to the judgment debtor, the developer company.

The Court was in agreement that the question to be decided must be confined to the four corners of the appeal. I, however, cannot agree if in our attempt to answer the problem we omitted to look at s. 126 of the Evidence Act as forming the basis of the objection of Mr. Lee's client. Section 126 of the Evidence Act reads (I quote in full):

> 126(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure:
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
>
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.
>
> Explanation - The obligation stated in this section continues after the employment has ceased.
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> Illustrations
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> (a) A., a client, says to B., an advocate: "I have committed forgery and I wish you to defend me."
>
> (b) As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.
>
> (b) A., a client, says to B., an advocate: "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."
>
> This communication being made in furtherance of a criminal purpose is not protected from disclosure.
>
> (c) A., being charged with embezzlement, retains B., an advocate, to defend him. In the course of the proceedings B. observes that an entry has been made in A's account-book, charging A. with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.
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> This being a fact observed by B. in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

On one's reading of s. 126 of the Evidence Act it would appear the evidence the section seeks to protect is the breach of matters told in confidence by a client to his legal adviser. Provided that such communication is not made in furtherance of any illegal purpose or showing a crime has indeed been committed which robs it of protection, such communication is protected and can be never be divulged, lest no one will repose any confidence in his legal adviser and will result in the drying up of such communication.

At a glance before s. 126 communication can apply there must be a prerequisite of client and solicitor (adviser) relationship and any disclosure if it is to take place must be with the absolute consent of the client.

In the present poser before us the facts are the money sought to be garnished had been paid by the individual purchasers to the solicitor garnishee as stakeholder. In whose employment at that material time was the solicitor garnishee? It is clear he was acting for the vendor, who under the present usual arrangement is also the developer company. The persons who made the payment, the purchasers, are not the agent or client of the garnishee solicitors who had been engaged by the developers under the Housing Developers (Control and Licensing) Regulations. I am of the view as submitted by Counsel for the respondent there is absence of communication or any relationship between the solicitor garnishee and purchasers. The privileged communication the solicitor garnishee is required to protect if any, is the communication of his client, the developer, to him. In our present context the communication is from a person not really his client. I find it is not a class of communication which the law was designed to protect. In my view it is communication which the purchaser would want to be made public and on the face of it should and ought to be published as suppressing it would result in no proof that the purchasers had paid and how much. Unfortunately for the solicitor garnishee by disclosing it, it would work to the detriment of his client but nonetheless it must be disclosed for the purchasers' benefit who had made those payments which must be accounted for. I agree with the argument of Mr. Ng for the respondents that there is no secrecy to be protected.

For reasons I gave I find that there is no merit in this appeal and I hereby dismiss it with costs to be taxed. As agreed by the parties this order of mine will bind the other related appeals. I order that the other appeals be also dismissed with costs.

Also found at [1991] 1 CLJ 729